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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD J. STOEHR,

Plaintiff,

v.

UBS SECURITIES LLC AND DOES 1 THROUGH 50,

Defendants.

Case No. C-08-0185-SC

DEFENDANT UBS SECURITIES LLC'S NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

Date: October 24, 2008
Time: 10:00 a.m.
Dept: Courtroom 1
Judge: Honorable Samuel Conti

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 24, 2008, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Samuel Conti, United States District Court, San Francisco, California, Defendant UBS Securities LLC ("UBS") will, and hereby does, move the Court pursuant to the Federal Rules of Civil Procedure 12(b)(6) for an Order dismissing the Complaint filed in this action.

This Motion is based on this Notice of Motion and Motion; the Memorandum of Points of Authorities below; all pleadings and papers filed herein; oral argument of counsel; and any other matter that may be submitted at the hearing.

ISSUES TO BE DECIDED (Civil Local Rule 7-4(a)(3))

1. Whether Plaintiff's Amended Complaint should be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6) in light of plaintiff's failure to remedy the deficiencies pointed out in the Court's Order of July 10, 2008 dismissing the Complaint.

2. Whether Plaintiff's Amended Complaint should be dismissed with prejudice for failure to comply with the Statute of Frauds.

3. Whether Plaintiff's quasi-contractual claim should be dismissed with prejudice as untimely.

4. Whether Plaintiff's Third Claim for Relief should be dismissed because the covenant of good faith and fair dealing is not a standalone claim.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff Richard Stoehr ("Stoehr") has filed an amended complaint seeking to correct the deficiencies set forth in the Court's Order of July 10, 2008 ("July 10 Order"), which dismissed his original complaint. Defendant UBS Securities LLC ("UBS") urges the Court to dismiss the amended complaint, this time *with prejudice*, for several reasons.

First, the amended complaint makes all the more clear that Stoehr's breach of contract claim is premised on an "agreement to agree" that is unenforceable under California law, as the Court ruled in its July 10 Order. Stoehr concedes, as he must, that the parties never reached

agreement on numerous essential terms of the alleged contract, and expressly reserved determination of those possibilities to future agreement. The amended complaint thus continues to violate the core of the Court's prior ruling.

Second, although Stoehr tries to skirt the Court's ruling by making vague claims of a part written, part oral agreement, these allegations do not save the amended complaint. The supposed oral terms are inadequately pled, contradict the allegation of the initial complaint, violate the parol evidence rule, and should not be considered at all. And even if the alleged oral terms are considered, they *still* cannot make out an enforceable contract claim under various principles of California contract law.

Third, the other claims in the amended complaint are deficient. The quantum meruit claim is time-barred on its face. The claim for "breach of the covenant of good faith and fair dealing" is not a standalone claim, but, rather, part of the contract claim that fails for the reasons above.

The amended complaint thus cures none of the deficiencies in the Court's July 10 Order. UBS respectfully requests that this case be dismissed with prejudice.

II. FACTUAL ALLEGATIONS

Stoehr alleges that beginning in 1989, he served as a consultant to SBC Warburg Dillion Read, Inc. ("SBC Warburg"),[1] and worked to identify potential opportunities for transactions, introduce mining companies and key individuals to SBC Warburg, and assist in the consummation of transactions. Amended Complaint ("AC") at ¶ 5. In 1997, Stoehr and SBC Warburg exchanged the correspondence that formed the basis of Stoehr's initial complaint.[2] The first letter is dated October 31, 1997 (the "October 1997 Letter") and was a proposal to Stoehr to serve as a consultant to the mining division at SBC for two years, commencing on October 1, 1997. Regarding proposed compensation, the letter called for an initial payment of $100,000 and a quarterly retainer of $120,000. The letter went on to state:

[1] SBC Warburg Dillon Read, Inc. was subsequently acquired by Defendant UBS Securities LLC. July 10 Order at 1, fn. 1.

[2] Notice of Removal, Dkt. No. 1, Exhibit A (Attachment to Complaint filed December 7, 2007 in *Stoehr v. UBS Securities LLC*, San Francisco Superior Court, Case No. 07-469841).

> We and you should seek to identify and agree, as early as practicable, situations that might qualify for additional payments and estimate the approximate additional amount. Each such situation will be *sui generis* (we shall often not know at the outset of a mandate how we shall ultimately earn our revenue) and will reflect, mainly, success fees and relative contribution. We can go through some illustrative examples of how this might work in relation to advisory and equity business. We have already identified and need to agree on an estimate of additional payment that could be due to you in respect of possible transactions on behalf of Amax Gold and Thompson Creek.

Id. (emphasis added). Stoehr wrote back to SBC on November 3, 1997, stating that the "letter is acceptable as written." *Id.*

As noted above, the Court ruled in its July 10 Order that the 1997 letters constituted an unenforceable agreement to agree. In his amended complaint, Stoehr seeks to work around that ruling by re-characterizing the agreement between himself and SBC Warburg as one that was reflected only "in part" by the October 31, 1997 letter. AC ¶ 6. Feeling thereby free to ignore the critical part of the letter that makes plain there is *no agreement* on future fees and that such fees will be decided on a "*sui generis*" basis, the amended complaint goes on to allege that "[p]laintiff's fee in connection with these possible transactions would be agreed upon in the same manner, and based on the same factors, as the parties had done in their previous course of dealing over the past seven years." *Id.* The amended complaint goes on to allege that because Stoehr introduced the principal owner of the Thompson Creek mine to SBC Warburg at some unspecified time (but presumably before his consulting relationship with SBC Warburg ended in 1999), and because he has not been paid anything from a transaction involving Thompson Creek in 2006, he is entitled to a fee in an amount that "would be based on the same factors as in the parties' previous course of dealing." AC ¶ 9.

Stoehr's strained effort to plead around the Court's July 10 Order fails for several reasons, set forth below.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), dismissal of a complaint "is appropriate if the plaintiff is unable to articulate 'enough facts to state a claim to relief that is plausible on its

face.'" July 10 Order at 4, citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). Although a court must accept as true properly pleaded factual allegations, it "need not…accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences." *Faigman v. Cingular Wireless*, LLC, 2007 U.S. Dist. LEXIS 14908, *7 (N.D. Cal. Mar. 1, 2007) (*citing Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). See also July 10 Order at 4, citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

In deciding a motion to dismiss for failure to state a claim, the court's review generally is limited to the contents of the complaint. See July 10 Order at 4-5. However, documents "are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [its] claim." *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997) (internal citation omitted). Here, the fatal defects in Stoehr's Amended Complaint appear both in Stoehr's allegations themselves and in the alleged contract between Stoehr and UBS, to which Stoehr repeatedly refers. See, *e.g.*, AC ¶¶ 6, 7, 13. Stoehr not only incorporates the contract by reference, it is central to Stoehr's claim. This Court, therefore, can and should consider these writings, copies of which are attached as exhibits to Stoehr's original complaint.[3]

IV. ARGUMENT

A. The Breach of Contract Claim Fails Because Stoehr Has Not Alleged a Legally Enforceable Agreement Between the Parties

1. The October 31, 1997 Letter Plainly Indicates An Unenforceable "Agreement to Agree"

First, as the Court properly held in the July 10 Order, the October 1997 Letter attached to Stoehr's initial complaint plainly states that the parties have *no agreement* as to future payments for potential transactions. The relevant paragraph of that letter starts by saying: "We and you should seek to identify and agree, as early as practicable, situations that might qualify for additional payments."[4] The final sentence of this paragraph states: "We have already identified

[3] Stoehr's initial complaint was Exhibit A to defendant's petition for removal, cited at footnote 2, *supra*, and is hereinafter referred to as his "Original Complaint."

[4] October 31, 1997 Letter at page 2, cited at footnote 2, *supra*.

and need to agree on an estimate of additional payment that could be due to you in respect of possible transactions on behalf of Amax Gold and Thompson Creek."[5] As this Court previously determined, "[b]oth sentences explicitly reference the need to agree, at some point in the future, on payment amounts for transactions that, at the time of the letter, were still mere possibilities."[6]

In light of this clear language in the October 1997 Letter, acknowledged by the Court in its July 10 Order, it is difficult to imagine a case that falls more squarely within California's prohibition on enforcing this kind of "agreement to agree." Here, as in *Smissaert v. Chiodo*, 163 Cal. App. 2d 827 (1958), the written document itself makes plain that the relevant issue is a matter to be agreed upon in the future. See also *Beck v. Am. Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1562 (1989) ("[A]n agreement for future negotiations [is] not the functional equivalent of a valid, subsisting agreement."); *Avalon Prods. v. Lentini*, 98 Cal. App. 2d 177, 179-80 (1950)(Where "there has been no agreement upon an essential element and the contract provides no means for the determination thereof but leaves it to the future negotiation and agreement of the parties, the contract is void.").

The amended complaint cannot convert these unequivocal written statements that the parties have *not* agreed and *might agree* in the future, into an agreement that Stoehr would be paid a fee. The October 1997 correspondence makes impeccably clear that Stoehr "could" be entitled to fees,[7] not that he "would" be entitled to them as a matter of obligation. It also states that both parties would need to agree on Stoehr's entitlement to additional fees. The amended complaint alleges no other written agreement beside the 1997 correspondence. It alleges no agreement that repudiates the 1997 correspondence; to the contrary, the amended complaint endorses and cites to it. AC ¶ 6.

The Court was correct in finding that the October 1997 Letter created no more than an unenforceable "agreement to agree." The amended complaint does nothing to change that conclusion.

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[5] *Id.* (emphasis added).

[6] July 10, 2008 Order at 7.

[7] October 31, 1997 Letter at page 2, cited at footnote 2, *supra*.

2. The Court Should not Consider the Amended Complaint's Vague and Unspecified Claims of a "Partly Oral, Partly Written" Agreement.

The Court should not permit the Stoehr to do an "about-face" and attempt to circumvent the Court's July 10 Order by claiming in the amended complaint that a vague amalgam of the same writings he relied upon before, plus unspecified oral communications, allow him to contradict the plain language of the October 1997 Letter.

For one, in his initial complaint, Stoehr made clear that he was relying exclusively on the 1997 writings as the source of defendant's supposed obligation.[8] Stoehr's original complaint states unequivocally that he is suing for breach of a "written" contract that was consummated on November 3, 1997.[9] Stoehr represented that a copy of the contract was attached to the complaint as Exhibit A, and at no point did he allege that there were any oral agreements between the parties covering the same subject matter. The law frowns upon taking positions in an amended complaint that contradict the allegations of the original complaint. "Where allegations in an amended complaint contradict those in a prior complaint, a district court need not accept the new alleged facts as true." *Azadpour v. Sun Microsystems, Inc.*, 2007 WL 2141079, at *2, n.2 (N.D. Cal. July 23, 2007). Stoehr cannot disavow these allegations – or the writings themselves – simply because he now needs to evade the consequences of the Court's July 10 Order that the written agreements upon which he previously relied are unenforceable. As the court noted in *Dodd v. Citizens Bank of Costa Mesa*, 222 Cal. App. 3d 1624, 1626-1627 (1990),"facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." *Id.* at 1626-27 (emphasis added).

Secondly, the amended complaint is hopelessly vague as to how the supposed agreement was "partly in writing and partly orally." AC ¶ 9. In order to state a valid claim for breach of contract, plaintiff must plead the nature and terms of the contract with reasonable certainty.[10]

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[8] Original Complaint at 3, cited in footnote 2, supra.

[9] *Id.* at Exhibit A.

[10] See *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1388-89 (1990); see also *Otworth v. S. Pac. Trans. Co.*, 166 Cal. App. 3d 452, 459 (1985) (sustaining demurrer for failure to set out terms of employment contract).

Furthermore, in order to satisfy Federal Rule of Civil Procedure 12(b)(6), plaintiff must state the "circumstances, occurrences, and events in support of the claim presented," making "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 127 S.Ct. at 1965 n.3, 1969 (internal quotation marks omitted). The amended complaint does not come close to satisfying either of these standards with respect to any alleged oral agreement.

Third, the October 1997 Letter states clearly that it "would supersede all preceding arrangements" between the parties, and Stoehr's November 3, 1997 response states that "[y]our letter is acceptable as written." Original Complaint at Attachments; AC ¶6. The parol evidence rule therefore bars Stoehr from relying on oral extrinsic evidence to vary, alter or add to the terms of such a written, integrated agreement.[11] But this is precisely what the amended complaint tries to do, claiming that an unspecified oral communication to compensate him in accordance with prior dealings was part of the "offer" that he accepted in the November 3, 1997 letter. AC at page 3, lines 3-7. In other words, Stoehr is seeking to allege parol evidence to turn the plain terms of the written 1997 correspondence – which disavowed any agreement on future fees – into an obligation to pay them in accordance with an oral understanding. Thus, Stoehr's alleged parol evidence is offered not to explain the meaning of the contract language, but to contradict it. This is precisely the evil the parol evidence rule was designed to prevent. See, e.g, *Haggard v. Kimberly Quality Care, Inc.*, 39 Cal. App. 4th 508, 518 (1995) (admission of evidence as to an implied oral agreement was improper where it contradicted terms of integrated written agreement).

3. Even if Plaintiff's Allegations of a "Partly Oral, Partly Written" Agreement are Considered, The Contract Allegations Remain Flawed.

Even if the Court were willing to consider Stoehr's vague and improper allegations of an unspecified but "partly oral" agreement, there would still be no enforceable agreement.

It is firmly established in California that no enforceable agreement may exist unless there

[11] Cal. Code Civ. Proc. § 1856; *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 345 (2004) (noting that the parol evidence rule "determines the enforceable and incontrovertible terms of an

is a meeting of the minds on all material terms.[12] Those terms must be sufficiently definite and certain so that a court can determine the scope of the parties' obligations, judge whether a breach of those obligations has occurred, and have a rational basis for the assessment of appropriate damages. *Id.*

The vague and contradictory allegations of the amended complaint plainly do not add up to a sufficiently definite contract to be enforceable. The October 1997 Letter makes plain that the parties would "need to agree" on additional payments that Stoehr "*could*" be entitled to; in stark contrast, the amended complaint asserts that "plaintiff *would be paid a fee* if and when defendant earned a fee from a sale transaction involving Thompson Creek…" (AC, ¶ 9) The October 1997 Letter states that and that the determination of any fees in the future would highly flexible, indeed "*sui generis*," which literally means "of its own kind" or "unique or peculiar;"[13] the amended complaint alleges, to the contrary, a structured arrangement that "the amount of his fee would be based *on the same factors as in the parties' previous course of dealing*." AC ¶ 9; see also AC ¶ 6. The October 1997 Letter states that Stoehr's entitlement to additional payments was reserved for situations where SBC, in its "sole discretion and subject always to the overall performance of the Group and the Mining Team;"[14] the amended complaint turns that into defendant's "promise to compensate him in accordance with the parties' previous course of dealing." AC ¶6.

There is no way to shape these diametrically-opposed concepts – one set of ideas in the written provisions of the October 1997 Letter and another set of concepts embodied in the amended complaint – into an "agreement," without simply fashioning it out of the whole cloth. The court cannot "make for the parties a contractual arrangement which they themselves did not make, nor to insert language which one party now wishes was there." *Sayble v. Feinman*, 76

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integrated written agreement").

[12] See *Bustamante v. Intuit Inc.*, 141 Cal. App. 4th 199, 209 (2006). "[T]he failure to reach a meeting of the minds as to all material points prevents the formation of a contract even though the parties may have orally agreed upon some of the terms or have taken some action related to the contract.") *Id.* at 215

[13] *Black's Law Dictionary,* (8th ed. 2004).

[14] October 1997 Letter at page 2, cited at footnote 2, *supra*.

Cal. App. 3d 509, 515 (1978). While courts will occasionally infer terms that are nonessential or can be readily determined by objective standards, that is inappropriate here, where the October 1997 letters expressly reserved any commitment on additional fees until Stoehr's "relative contribution" could be assessed, and expressly stated that the parties would "need to agree" on Stoehr's entitlement to more fees at that time.[15] See, *e.g.*, *Diamond Mining & Mgmt., Inc. v. Globex Minerals, Inc.*, 421 F. Supp. 70, 75 (N.D.Cal. 1976) ("Recognizing that the responsibility for drafting contracts lies properly with the parties rather than with the courts, [California] state law has long dictated that an agreement devoid of a material term, and thus indicating the need for future agreement between the parties, is void.")

Finally, it is apparent from review of the conflicting and vague allegations of the amended complaint that Stoehr is not really seeking to enforce a definable agreement, but to initiate a lawsuit, obtain discovery, and to force the defendant *to reach an agreement*. Indeed, one paragraph of the amended complaint goes so far as to complain that defendant "has refused to enter into discussions to arrive at a mutually agreeable fee"! AC ¶ 10. Given that there are no allegations in the Amended Complaint establishing any discernible connection between the work Stoehr allegedly performed for Thompson Creek in 1997, and the deal UBS completed for Thompson Creek in 2006, it is hard to see how a Court could *ever* fashion such a remedy. This fundamental uncertainty as to how to assess damages further supports the alleged agreement's unenforceability.[16]

4. The Statute of Frauds Precludes Enforcement

Alternatively, the Statute of Frauds bars plaintiff's alleged agreement, because the contract could not be performed within one year and there was no writing containing all essential terms. Cal. Civ. Code § 1624(a)(1). The agreement alleged in the amended complaint includes the October 1997 Letter as part of its terms, AC ¶6. That letter include a two-year consulting

[15] October 31, 1997 Letter, cited at footnote 1, *supra.*

[16] See *Alexander v. Codemasters Group Ltd.*, 104 Cal. App. 4th, 129, 152 (2002) (court must have a "reasonably certain basis for giving an appropriate remedy") (citations omitted).

commitment, which on its face could not be performed within a year.

The California Supreme Court has held that in order to satisfy the Statute of Frauds, there must be a written instrument that contains all of the essential terms of the contract. *Sterling v. Taylor*, 40 Cal. 4th 757, 766 (2007). The statute of frauds "demands that every material term of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not." *Casa Herrera*, 32 Cal. 4th at 345. Here, the core portion of the supposed agreement alleged in the amended complaint – the commitment to pay a fee for a future Thompson Creek transaction in accordance with prior dealings – is *not* in writing. The only writings alleged are the October 31, 1997 letter and Stoehr's November 3, 1997 response, and those letters include no such term. Consequently, this case can also be dismissed pursuant to the Statute of Frauds. See *Riley v. Bear Creek Planning Comm.*, 17 Cal. 3d 500, 509 (1976)[17] ("Every material term of an agreement within the statute of frauds must be reduced to writing. No essential element of a writing so required can be supplied by parol evidence.")

B. Stoehr's Claim For Breach of the Covenant of Good Faith and Fair Dealing Fails For the Same Reasons the Breach of Contract Claim Fails.

Stoehr's claim for breach of the covenant of good faith and fair dealing is superfluous and should, therefore, be dismissed. The implied covenant of good faith and fair dealing is not "endowed with an existence independent of its contractual underpinnings." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 36 (1995). The covenant does not apply in the absence of an agreement, and even where implied, it does not create obligations contrary to the express terms of the agreement or understanding. See *Guz v. Bechtel Nat'l, Inc.* 24 Cal. 4th 317, 349 (2000) (The covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement."); *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation,* 11 Cal. App. 4th 1026, 1032 (1992) ("[i]f there exists a contractual relationship between the parties, . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated

[17] *Overruled on other grounds in Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 366 n. 6 (1995).

in the contract.") This claim should therefore be dismissed for the same reasons as the breach of contract claim.

C. Stoehr's Quantum Meruit Claim Is Time Barred

The two-year statute of limitations for quasi-contractual claims begins to run immediately upon performance of the service at issue. See *3 Witkin, Cal. Procedure* (4th ed. 1997) Actions § 508 ("When services are performed at the request of another without a contract, the duty implied by law to pay for them arises immediately on performance. Hence the statute begins to run, and the plaintiff may recover only for the value of services rendered within 2 years before the suit is filed."); *Cohn v. Levy*, 2007 WL 2405810 at *5 (Cal. App. Aug. 24, 2007). The Amended Complaint does not allege that Stoehr performed any work for UBS after October of 1999, more than eight years before Stoehr filed suit. Consequently, Stoehr missed the statute of limitations by more than six years, rendering his quasi-contractual claim time barred and subject to dismissal.

D. The Amended Complaint Should be Dismissed with Prejudice

Stoehr already has had an opportunity to cure the defects in his claims, and further amendment would be futile. Accordingly, this case should be dismissed with prejudice. See, *e.g.*, *Chavez v. Blue Sky Natural Beverage Co.*, 503 F.Supp.2d 1370, 1374-75 (N.D.Cal. 2007).

V. CONCLUSION

The Court should dismiss Stoehr's Amended Complaint in its entirety and with prejudice.

Dated: August 28, 2008

Respectfully submitted,

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